SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 311

MURRAY B. MCLEOD, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS, PETITIONER,

vs.

J. E. DILWORTH COMPANY AND REICHMAN-CROSBY COMPANY

No. 312

MURRAY B. MCLEOD, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS, PETITIONER,

vs.

BINSWANGER AND COMPANY

ON PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 31, 1943.

—7745

[fol. 1] IN SUPREME COURT OF ARKANSAS

No. 6973

JOE HARDIN, Commissioner of Revenues, Appellant

v.

J. E. DILWORTH COMPANY, Appellee

Pulaski Chy. Clk. Frank H. Dodge, Ch., $11.50.

PRAYER FOR AND ALLOWANCE OF APPEAL—September 23, 1942

Comes the plaintiff herein and by his attorney, prays an appeal to the Supreme Court.

Leffel Gentry, Attorney.

Appeal granted Sept. 23, 1942.

C. R. Stevenson, Clerk, by Frank H. Cox, D. C.

[fol. 2] [Caption omitted]

[fol. 3] IN THE PULASKI CHANCERY COURT

No. 64347

JOE HARDIN, Commissioner of Revenues of the State of Arkansas, Plaintiff,

v.

J. E. DILWORTH COMPANY, a Corporation, Defendant

COMPLAINT—Filed March 11, 1942

I

The plaintiff, Joe Hardin, is the duly appointed, qualified and acting Commissioner of Revenues of the State of Arkansas.

II

Act 154 of the acts of the General Assembly of 1937, as amended by act 364 of the acts of the General Assembly of 1939, levied a tax of two per cent (2%) on the gross

proceeds derived from all retail sales as defined in said act. The said tax was levied upon the purchaser, but said act provided that the retailer was to collect the tax and remit the same to the Commissioner of Revenues. Prior to September 24, 1940, the Commissioner of Revenues had not interpreted the act to apply to sales in interstate commerce but, on said date, September 24, 1940, the Commissioner of Revenues promulgated a Regulation requiring the collection and payment of the taxes on sales originating outside the State where the delivery of the tangible personal property was finally made to a purchaser at a point in the State of Arkansas. A copy of said Regulation is attached hereto, marked "Exhibit A" and made a part hereof.

Act 386 of 1941 became effective July 1, 1941, and repealed act 154 of 1937, as amended. It levied a tax of two per cent (2%) on the gross proceeds derived from all sales as defined in said act, except such sales as were specifically exempt. The tax was upon the purchaser but [fol. 4] the seller was required to collect and remit the tax to the Commissioner of Revenues. Simultaneous with the effective date of said act 386 of 1941, the Commissioner of Revenues, under authority of said act, promulgated Article No. 27, in substance the same as Regulation No. 16, theretofore in effect under act 154 of 1937, as amended. A copy of said Regulation No. 27 is attached hereto, marked "Exhibit B" and made a part hereof.

III

The defendant, J. E. Dilworth Company, is a corporation, organized under the laws of the State of Tennessee, with its principal place of business in the city of Memphis, Tennessee. It is not qualified to do business in Arkansas and has no sales offices, branch plants or other places of business in said State, but it engages in business activity as defined by Regulation No. 16, promulgated under act 386 of 1941. Its activity in Arkansas is as follows:

A. Orders for machinery and mill supplies are procured in Arkansas principally by two traveling representatives of defendant, both domiciled in the city of Memphis, Tennessee, and who, as traveling representatives, cover, in their regular routes of solicitation, states other than Arkansas. Machinery and mill supplies acquired by the defendant's

Arkansas customers are approximately eighty-six per cent (86%) for consumption and fourteen (14%) for resale. All orders are taken by said traveling salesmen subject to the approval and acceptance of the Memphis office, and the order-forms so specify. If the order is approved and accepted by the Memphis office, it is filled and shipped f. o. b. Memphis, Tennessee, title to the merchandise being relinquished upon delivery to a common carrier. The traveling representatives have no authority to, and do not, collect accounts, their express authority being specifically limited [fol. 5] to the solicitation of orders which must be subsequently approved and accepted by proper central office authorities. No title-retaining contracts or vendor's lien notes are maintained in the State of Arkansas, and the only recourse defendant possesses for the collection of its accounts is a claim for an open account receivable. The defendant is in the general Interstate Business.

B. Defendant receives orders by mail and telephone from customers in Arkansas which, if accepted, are filled and merchandise delivered to a common carrier in Memphis, the purchaser paying the freight.

C. The defendant company also makes sales of goods or merchandise to purchasers who come from Arkansas and obtain delivery of such goods or merchandise at its place of business in Memphis, which goods or merchandise are taken by the purchasers into the State of Arkansas for use or consumption.

IV

The plaintiff, Commissioner of Revenues of the State of Arkansas, has demanded that the defendant report the gross proceeds derived from all of its sales in Arkansas since the date of September 24, 1940, not including that merchandise sold and delivered in Memphis to Arkansas purchasers (mentioned in Paragraph III-C) and has demanded that the defendant company remit to him a tax of two per cent (2%) of the gross proceeds derived from all such sales, except those sales for resale or such other sales as may be specifically exempt by law, but the defendant company has failed and refused to make such reports or to pay the taxes demanded of it.

The amount of such sales as made by the defendant company during said period of time and the tax due the Commissioner of Revenues on such sales is unknown to him, and, in order to ascertain the amount of the taxes due by the [fol. 6] defendant company, an accounting is necessary; and, therefore, the plaintiff has no adequate remedy at law.

Wherefore, the plaintiff, Joe Hardin, Commissioner of Revenues for the State of Arkansas, prays that the defendant, J. E. Dilworth Company, be required to submit its records so that an accounting may be had of its sales to purchasers in the State of Arkansas, and that, upon such accounting, the amount of taxes due by the defendant company to the Commissioner of Revenues have judgment for and against said defendant company for such amount; and the plaintiff further prays for his costs and all other proper relief.

Leffel Gentry, Attorney for plaintiff.

[fol. 7] EXHIBIT A TO COMPLAINT

Supplemental Regulation Arkansas Retail Sales Tax Law
Sales in Interstate Commerce

Article 16

The Department of Revenues reserves the right to pass upon and determine each question regarding interstate commerce. If a ruling is desired as to whether or not the gross receipts of any given transaction are exempt under the Arkansas Sales Tax Law, the Department will make such ruling, provided all of the facts surrounding such transactions are submitted for consideration.

Sales of Property Originating in the State of Arkansas

A. Where tangible personal property is located within the State at the time of sale and pursuant to and as a part of the sale does not leave the State the sale is within the Arkansas Retail Sales Tax Law, irrespective of where the parties to the contract to sell are located, or the place where the contract was made or accepted or the purchase price paid. It is immaterial that the purchaser may, sub-

sequent to the sale, transport the property out of this State or use it in interstate commerce.

B. The tax does not extend to sales where the seller makes physical delivery of the goods sold to the consumer at a point outside of this State, when such goods are not to be returned to a point within this State. The tax does not apply to sales where the vendor by carrier or by mail delivers the goods sold from a point in this State to a point outside this State on order of buyer. In order to establish an exemption of the proceeds of such sales the seller will be required to retain for his records, and available for inspection, waybills, bills of lading, orders and other data [fol. 8] as evidence of such transactions. If the vendee is a carrier, delivery to vendee in this State will constitute a taxable sale in the State, irrespective of the nature of the bills of lading or other shipping date.

Sales of Property Originating in Other States

When tangible personal property is purchased for use or consumption in this State and (1) the seller engages in any business activity in this State, and (2) delivery is made in this State, such sale is subject to the sales tax. Such sale is taxable regardless of the fact that the purchaser's order may specify that the goods are to be manufactured or procured by the seller at a specified point outside this State and shipped directly to the purchaser from the point of origin. (See McGoldrick v. Derwind-White Coal Company, Sup. Ct. of U. S., decided January 29, 1940, and companion cases; Graybar Electric Co. v. Curry, Alabama Sup. Ct., May 26, 1939, Aff'd. Sup. Ct. of U. S., Nov. 6, 1939.)

If the conditions above are met, it is immaterial (1) that the contract of sale is closed by acceptance outside the State, or (2) that the contract is made before the property is brought into the State, or (3) that the contract of sale purports to require transfer of possession of such property outside the State of Arkansas.

Delivery is held to have taken place in this State (1) when physical possession of the tangible personal property is actually transferred to the buyer within this State, or (2) when the tangible personal property is placed in the mails directed to the buyer within this State, or placed on board a carrier (FOB or otherwise) and directed to the buyer in this State.

Engaging in business in this State may include any of the following methods of transacting business: Maintaining directly, indirectly or through a subsidiary an office, [fol. 9] distribution house, sales house, warehouse or other place of business or by having an agent, salesman or solicitor operating within the State under the authority of the seller or its subsidiary, irrespective of whether such place of business, agent, salesman or solicitor is located in this State permanently or temporarily or whether such seller or subsidiary is qualified to do business in this State.

Sales by a jobber of materials ordered from an independent out-of-state manufacturer with delivery directly from the out-of-state manufacturer to the purchaser is a retail sale within the meaning of the act. (Hollis & Co. v. McCarroll).

Sales consummated as above stated are taxable whether the same originate in another State or a foreign country.

Z. M. McCarroll, Commissioner of Revenues for the State of Arkansas.

September 24, 1940.

[fol. 10] EXHIBIT B TO COMPLAINT

Article 27

When tangible property is purchased by any person or business in this State for any purpose other than for resale and (1) the seller is a corporation qualified to do business in this State, or the seller carries on any business activity in this State, and (2) delivery is made in this State, such sale is intra-state and subject to the Gross Receipts Tax.

The term "business activity" for the purpose of this Regulation means maintaining any office of any kind, warehouse or place of distribution, directly or indirectly, by means of a subsidiary and/or agency, or the maintaining of any other place, whether business location or otherwise, from which orders are solicited or taken or at which place employees, agents and/or solicitors have their headquarters, or the mere solicitation of any business in this State or the servicing of any property by any employee, agent or salesman, irrespective of whether a place of business is maintained, or if maintained, whether the place of business

is permanent or temporary and irrespective of the length of time of engaging in such business activity as herein defined.

For the purpose of this Regulation "delivery" is made in this State (1) when actual possession of the tangible personal property is transferred to the buyer within this State, or (2) when the tangible personal property is placed in the mails or on board a carrier (FOB or otherwise) and directed to the buyer in this State. In instances of sales under the conditions just recited it is immaterial that the goods were produced by the seller outside the State and shipped directly to the purchaser from the point of origin or that the contract of sale was closed by acceptance outside the State or that the contract was made before the property was brought into the State or that the buyer may [fols. 11-12] subsequently transport the property out of the State for use or consumption.

When tangible personal property is sold by sellers in this State and the seller is obligated to deliver the property to a point outside the State or to deliver it to a carrier or to the mail to be delivered to a point outside the State, the tax does not apply, such sales being sales in interstate commerce.

[File endorsement omitted.]

[fol. 13] IN THE PULASKI CHANCERY COURT

[Title omitted]

ANSWER—Filed March 31, 1942

Comes the defendant, J. E. Dilworth Company, and by way of answer to the plaintiff's original complaint, respectfully shows to the court:

I

Admits the allegations contained in Paragraphs I and II of the complaint.

II

Admits the allegations contained in Paragraph III, except as to lines 6 and 7, wherein plaintiff alleges defendant

to be engaged in business activity as defined by Regulation No. 16, promulgated under act 386 of 1941, this allegation being specifically denied.

III

Admits the allegation contained in the first sub-paragraph of Paragraph IV of complaint.

Admits that plaintiff has no adequate remedy at law; therefore, admits the jurisdiction of the court but denies that plaintiff is entitled to an accounting, for the reason that defendant's business is not taxable, as alleged by plaintiff.

Denies the allegation contained in sub-paragraph III of Paragraph IV of plaintiff's complaint, the same, in substance, being plaintiff's prayer.

IV

[fol. 14] If sales were made to defendant's customers in Arkansas, they were consummated in Memphis, Tennessee, delivery of merchandise was made in Tennessee and such transactions are not taxable under act 154 of 1937, as amended by act 364 of 1939, or act 386 of 1941 and the regulations promulgated in connection therewith.

V

Regulation No. 16, promulgated under act 154 of 1937, as amended, and No. 27, promulgated under act 386 of 1941, in substance amount to an enlargement of the acts thereunder, a power expressly conferred upon the Legislature, alone, by the Constitution of 1874, and such regulations are, therefore, void.

VI

Acts 154 of 1937, as amended, and/or 386 of 1941, together with regulations pertaining thereto, in so far as they apply to defendant's transactions in Arkansas, are void as being contrary to and infringing upon the Commerce Clause of the Constitution of the United States, the same being Article 1, Paragraph VIII, and the Due Process Clause of the Constitution of the United States, the same being Amendment No. 14.

Wherefore, defendant prays that plaintiff's complaint herein be dismissed for want of equity; that it be expressly

adjudged and decreed that act 154 of 1937, as amended, and act 386 of 1941, together with the regulations promulgated in connection therewith, are unconstitutional and void as applicable to defendant's transactions in Arkansas as set out by the complaint; that defendant have judgment for its costs herein expended, and for all other proper and equitable relief.

J. Bred Brown, of Memphis, Tennessee; Allan Davis, [fols. 15-16] of Memphis, Tennessee; Bradley & Patten, of Little Rock, Arkansas, Solicitors for Defendant.

[File endorsement omitted.]

[fol. 17] IN THE PULASKI CHANCERY COURT

[Title omitted]

STIPULATION AS TO CERTAIN FACTS—Filed May 13, 1942

It is hereby stipulated and agreed between the parties plaintiff and defendant, through their respective counsel, that the statements hereinafter set forth may be taken as true upon trial of this cause, without prejudice to the right of either party to offer further evidence not inconsistent with the facts herein stipulated.

I

Defendants gross receipts from Arkansas Customers for the period September 24, 1940, to June 30, 1941, are as follows:

Total Receipts	$43,148.98	
Less Sales for Resale	1,546.06	
Balance		$41,602.92
Orders secured by traveling representatives, approved and accepted in Memphis and goods shipped FOB Memphis, Tennessee	$20,801.96	
Orders received by telephone and telegraph in Memphis, approved, accepted and filled in Memphis and shipped FOB Memphis, Tennessee	2,080.15	

Orders submitted by customers coming to Memphis and accepting delivery of merchandise in Tennessee but carried into Arkansas for consumption	10,400.00	
[fol. 18] Orders received by mail, approved, accepted and shipped in Memphis, FOB Memphis, Tennessee	8,319.83	
Total		$41,602.92

II

Defendant's gross receipts from Arkansas customers for the period July 1, 1941; to September 30, 1941, are as follows:

Total Receipts	$18,741.93	
Less Sales for Resale	5,760.01	
Balance		$12,981.92
Orders secured by traveling representatives, approved and accepted in Memphis and goods shipped FOB Memphis, Tennessee	$6,490.96	
Orders received by telephone and telegraph in Memphis, approved, accepted and filled in Memphis and shipped FOB Memphis, Tennessee	649.05	
Orders submitted by customers coming to Memphis and accepting delivery of merchandise in Tennessee but carried into Arkansas for consumption	3,245.48	
Orders received by mail, approved, accepted and shipped in Memphis, FOB Memphis, Tennessee	2,596.43	
Total		$12,981.92

It is expressly stipulated that the above figures being abreed upon by the parties hereto might be used by the

court in the assessment of sales and gross receipt taxes against the defendant if any be found to be due.

[fols. 19-20] Joe Hardin, Commissioner of Revenues of the State of Arkansas, by Elsijane Trimble, Attorney. J. E. Dilworth Company, a Corporation, by J. Fred Brown, Attorney.

[File endorsement omitted.]

[fol. 21] IN THE PULASKI CHANCERY COURT

No. 64347

JOE HARDIN, Commissioner of Revenues of the State of Arkansas, Plaintiff,

v.

J. E. DILWORTH COMPANY, a Corporation, Defendant.

DECREE—May 13, 1942

This cause came on regularly to be heard upon the original complaint of the plaintiff, together with the exhibits thereto attached, the answer of the defendant, the stipulation of the parties and upon the entire record and oral argument of counsel in open court, Leffel Gentry and Elsijane Trimble, for the plaintiff, and J. Fred Brown, for the defendant, from all of which it appears to the court as follows:

The allegations as set forth in the original complaint, and the exhibits thereto attached, admitted by the defendant, and all facts affirmatively alleged by the answer, not denied by the plaintiff's reply, together with the stipulation agreed upon by counsel and filed in connection herewith, are true and correct; from which the court finds that the plaintiff cannot require the defendant to collect and remit the Arkansas sales or gross receipts tax, and that the plaintiff cannot recover taxes from the defendant, as sought in the complaint.

It is, therefore, ordered, adjudged and the court does hereby declare and decree that the complaint of the plaintiff be and the same is hereby dismissed, and that he recover nothing from the defendant.

To which ruling of the court in dismissing plaintiff's complaint, exception was timely reserved by the plaintiff

and an appeal prayed to the Supreme Court, which was duly granted. May 13, 1942. (Chancery Record 120, p. 393).

[fol. 22] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 23] IN THE SUPREME COURT OF ARKANSAS

No. 6974

JOE HARDIN, Commissioner of Revenues, Appellant,

v.

REICHMAN-CROSBY COMPANY, Appellee.

Pulaski Chy. Clk. Frank H. Dodge, Ch. $11.50.

PRAYER FOR ALLOWANCE OF APPEAL—September 23, 1942

The plaintiff herein, by his attorney, prays an appeal to the Supreme Court.

Leffel Gentry, Attorney for Plaintiff.

Appeal granted Sept. 23, 1942.

C. R. Stevenson, Clerk, by A. G. Sadler, D. C.

[fol. 24] [Caption omitted]

[fol. 25] IN THE PULASKI CHANCERY COURT

No. 64278

JOE HARDIN, Commissioner of Revenues of the State of Arkansas, Plaintiff,

v.

REICHMAN-CROSBY COMPANY, a Corporation, Defendant

COMPLAINT—Filed February 26, 1942

1

The plaintiff is the duly appointed, qualified and acting Commissioner of Revenues of the State of Arkansas.

2

Act 154 of the acts of the General Assembly of 1937, amended by act 364 of the acts of the General Assembly of 1939, levied a tax of two percent (2%) on the gross proceeds derived from all retail sales as defined in said act.

The said tax was levied upon the purchaser but, by the terms of said act, it was provided that the retailer was to collect the tax and remit the same to the Commissioner of Revenues. Prior to September 24, 1940, the Commissioner of Revenues had not interpreted the act to apply to sales in interstate commerce but, on said date, September 24, 1940, the Commissioner of Revenues promulgated a regulation requiring the collection and payment of the taxes on sales originating outside the State where the delivery of the tangible personal property was finally made to a purchaser at a point in the State of Arkansas. A copy of said Regulation is attached hereto as "Exhibit A".

Act 386 of 1941 became effective July 1, 1941 and repealed act 154 as amended. It levied a tax of two percent (2%) on the gross proceeds derived from all sales as defined in said act, except such sales as were specifically exempted. The tax was upon the purchaser, but the seller was required to collect and remit the tax to the Commis- [fol. 26] sioner of Revenues. Simultaneous with the effective date of said act 386 of 1941, the Commissioner of Revenues, under authority of said act, promulgated Article numbered 27, in substance the same as Regulation numbered 16 theretofore in effect under act 154 of 1937, as amended. A copy of said Regulation numbered 27 is attached hereto as "Exhibit B".

3

The defendant, Reichman-Crosby Company, is a corporation organized under the laws of the State of Tennessee, with its principal place of business in the City of Memphis, Tennessee. It is not qualified to do business in Arkansas and has no place of business in this State, but it engages in business activity as defined by Regulation numbered 16, promulgated under act 154 of 1937, as amended, and as defined by Article 27 of the Regulations promulgated under act 386 of 1941. It manner of doing business in Arkansas is as follows:

a. It is engaged in the mill supply business and, for the most part, its sales are to consumers, but a small part of its business consists of sales to retailers for resale. It has several traveling salesmen or solicitors who travel out of Memphis and in the State of Arkansas and solicit orders in this State. All orders are taken by said traveling sales-

men subject to the acceptance at the home office of the company in Memphis, Tennessee, and the authority of such traveling salesmen is so limited. If the order is accepted by the company the goods are delivered to a common carrier f. o. b. Memphis, the customer pays the freight and the goods are consigned direct to the customer.

b. The company receives orders by mail and telephone from customers in Arkansas and if these orders are accepted the goods are delivered to a common carrier, consigned to the purchaser in Arkansas, f. o. b. Memphis, the purchaser paying the freight.

c. The defendant company also makes sales of goods or [fol. 27] merchandise to purchasers who come from Arkansas and obtain delivery of such goods or merchandise at its place of business in Memphis, which goods or merchandise are taken by the purchasers into the State of Arkansas for use or consumption.

4

The plaintiff, Commissioner of Revenues of the State of Arkansas, has demanded that the defendant report the gross proceeds derived from all of its sales in Arkansas since the date of September 24, 1940, not including that merchandise sold and delivered in Memphis to Arkansas purchasers (mentioned in paragraph 3-c) and has demanded that the defendant company remit to him a tax of two percent (2%) of the gross proceeds derived from all such sales, except those sales for resale or such other sales as may be specifically exempt by law, but the defendant company has failed and refused to make such reports or to pay the taxes demanded of it.

The amount of such sales as made by the defendant company during said period of time and the tax due the Commissioner of Revenues on such sales is unknown to him and, in order to ascertain the amount of the taxes due by the defendant company, an accounting is necessary; and, therefore, the plaintiff has no adequate remedy at law.

Wherefore, the plaintiff, Joe Hardin, Commissioner of Revenues for the State of Arkansas, prays that the defendant, Reichman-Crosby Company, be required to submit its

records so that an accounting may be had of its sales to purchasers in the State of Arkansas and that, upon such accounting, the amount of taxes due by the defendant company to the Commissioner of Revenues be determined, and that the Commissioner of Revenues have judgment for against said defendant company for such amount; and the plaintiff further prays for his costs and all other proper relief.

Leffel Gentry, Attorney for Plaintiff.

[fols. 28-30] EXHIBIT A TO COMPLAINT

Omitted. Printed side page 7 ante.

[fol. 31] EXHIBIT B TO COMPLAINT

Omitted. Printed side page 10 ante.

[fols. 32-33] [File endorsement omitted.]

[fol. 34] IN THE PULASKI CHANCERY COURT

[Title omitted]

ANSWER OF REICHMAN-CROSBY COMPANY, A CORPORATION—Filed April 1, 1942

Defendant, Reichman-Crosby Company, a Corporation, appears by its attorneys, Daggett & Daggett, of Marianna, Arkansas, and for answer to the complaint states:

The allegations of paragraphs One (1), Two (2) and Three (3) of the complaint are admitted but are insufficient, separately or collectively, in law or in fact, to constitute a cause of action against defendant.

For answer to paragraph Four (4) of the complaint, defendant states that the gross receipts from sales made by defendant to residents of Arkansas, in the manner set forth in the complaint, during the period from September

24, 1940, to July 1, 1941, and from July 1, 1941, to November 1, 1941, are shown in the following tabulated statement:

From September 24, 1940, to July 1, 1941:

(1) Gross receipts from sales where the order is secured by traveling salesman or solicitors of the company, where the order is accepted and goods shipped f. o. b. Memphis or consigned to the purchaser	$49,554.10
(2) Gross receipts from sales made by orders from Arkansas residents where the orders are telephoned or sent by mail to Reichman-Crosby Company and by it delivered to a common carrier, consigned to the purchaser	79,766.89
(3) Gross receipts from sales made to Arkansas residents who come to Memphis, pur- [fol. 35] chase the goods and take them away in their own trucks	17,990.90
(4) Gross receipts from sales made in wholesale to retailers in the State of Arkansas, said sales being made for the purpose of resale	11,247.40

From July 1, 1941, to November 1, 1941:

(1) Gross receipts from sales where the order is secured by traveling salesmen or solicitors of the company, where the order is accepted and goods shipped f. o. b. Memphis consigned to the purchaser	37,676.89
(2) Gross receipts from sales made by orders from Arkansas residents where the orders are telephoned or sent by mail to the Reichman-Crosby Company and by it delivered to a common carrier, consigned to the purchaser	60,648.14
(3) Gross receipts from sales made to Arkansas residents who come to Memphis, purchase the goods and take them away in their own trucks	13,678.79

(4) Gross receipts from sales made in wholesale to retailers in the State of Arkansas, said sales being made for purpose of resale $8,569.85

Defendant further states that Item 4, in the sum of $8,569.85 includes a sale of goods made by defendant to Lawson M. Wilhoit, of LeGrange, Lee County, Arkansas, in the sum of $50, on mail order dated July 2, 1941, and that the said Lawson M. Wilhoit had not, on said date, applied for nor received the permit provided for, and required by, [fol. 36] act 386 of the acts of 1941, from the Revenue Department of the State of Arkansas, and did not so receive such permit until July 7, 1941.

By way of affirmative defense and in bar of the right of plaintiff to enforce and recover the tax herein sought to be enforced and recovered, defendant further says:

1. Act 154-1937, as amended by act 364-1939, and act 386-1941 are not applicable to sales of goods such as are alleged to have been made by defendant in the conduct of its business wholly in interstate commerce and are void as being contrary to and infringing on the Commerce Clause of the Federal Constitution, and that any endeavor on the part of plaintiff, in his official capacity, to enforce and collect the tax alleged to be due by defendant on sales of goods so alleged to have been made by defendant would constitute a burden on interstate commerce and constitute a violation of Section 9, Article I, of the Constitution of the United States.

2. Regulation 16, promulgated by the Commissioner of Revenues under act 154 of the acts of the General Assembly of 1937, as amended by act 364 of the acts of the General Assembly of 1939, and Regulation Number 27, promulgated by the Commissioner of Revenues under act 386 of the acts of the General Assembly of 1941, are naught more than an attempt on the part of the Commissioner to levy and enforce a tax on the use of the property sold by defendant to residents of Arkansas and, therefore, constitutes an additional tax on the property itself, in violation of the uniformity provisions contained in Article XVI, Section 5, of the Constitution of Arkansas, 1874.

3. Act 154 of the acts of the General Assembly of 1937, as amended by act 364 of the acts of the General Assembly of 1939, was construed by the Supreme Court of Arkansas in Mann v. McCarroll, Commissioner, 198 Ark. 628, in which the court held that the provisions of said act, as amended, could not be extended to sales of personal property consummated in other states and subsequently delivered to [fol. 37] residents of Arkansas within the State of Arkansas. Defendant, therefore, pleads a vested right in such judicial construction of said act and says that the attempt of plaintiff to collect the tax sought to be collected from defendant herein, during the period between September 24, 1940, to July 1, 1941, is prohibited by the Fourteenth Amendment to the Constitution of the United States and by Section 8 of Article II of the Constitution of the State of Arkansas.

4. Act 386 of the General Assembly of 1941 is virtually a reenactment of act 154 of the acts of 1937, as amended by act 364 of the acts of 1939. Therefore, the judicial construction of the act of 1937 by this Court, in Mann v. McCarroll, must be deemed to be the legislative intent of act 386 of the acts of 1941, and said act 386 must be so construed.

5. Defendant further states that at all times during the period between September 24, 1940, to this date, it has not in anywise been engaged in an intrastate business in the State of Arkansas. To the very contrary, the only business it has conducted in the State of Arkansas has been interstate in character. All of the sales of goods, wares or merchandise made by defendant to residents of Arkansas have been made on contracts entered into and wholly performed in the State of Tennessee and without the State of Arkansas. And, therefore, the State of Arkansas is without power to tax a transaction, contract or alleged sale of goods, wares or merchandise made by defendant beyond the territorial limits of the State of Arkansas.

Premises considered, defendant prays that it be discharged with its costs herein expended, and for all other proper and equitable relief.

Respectfully submitted, Daggett & Daggett, by W. H. Daggett.

[fols. 38-39] [File endorsement omitted.]

[fol. 40] IN THE PULASKI CHANCERY COURT

No. 64278

JOE HARDIN, Commissioner of Revenues, State of Arkansas, Plaintiff,

v.

REICHMAN-CROSBY COMPANY, Defendant

DECREE—May 13, 1942

On this day plaintiff, Joe Hardin, Commissioner of Revenues for the State of Arkansas, appeared by his attorneys, Leffel Gentry and Elsijane Trimble; and defendant, Reichman-Crosby Company, appeared by attorneys Daggett & Daggett. Thereupon, this cause was submitted to the court on the complaint of plaintiff and the answer of the defendant thereto.

On the facts alleged in the plaintiff's complaint, admitted in the answer of the defendant, and upon the facts alleged by way of affirmative defense in defendant's answer, not denied by plaintiff, the court finds that plaintiff cannot enforce against, nor recover from, the defendant any taxes alleged to be due by defendant in the complaint filed by plaintiff.

Therefore, it is by the court considered, ordered and adjudged that the complaint of the plaintiff be, and is, hereby dismissed.

To the ruling and action of the court in dismissing the complaint of the plaintiff, exceptions were taken by plaintiff and an appeal prayed to the Supreme Court, which is granted. May 13, 1942. (Chancery Record 120, p. 394.)

. . . . . .

[fol. 41] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 42] IN THE SUPREME COURT OF ARKANSAS

No. 6973

MURRAY B. McLEOD, Commissioner of Revenues, Appellant,

v.

J. E. DILWORTH COMPANY, Appellee

No. 6974

MURRAY B. McLEOD, Commissioner of Revenues, Appellant,

v.

REICHMAN-CROSBY COMPANY, Appellee

No. 6975

MURRAY B. McLEOD, Commissioner of Revenues, Appellant,

v.

BINSWANGER & COMPANY, Appellee

MOTION TO SUBSTITUTE AS PLAINTIFF (APPELLANT) MURRAY B. McLEOD, COMMISSIONER OF REVENUES, SUCCESSOR IN OFFICE TO JOE HARDIN, COMMISSIONER OF REVENUES, AND TO CONSOLIDATE THE ABOVE CAUSES

Comes Murray B. McLeod, Commissioner of Revenues of the State of Arkansas and states that he is successor in office to Joe Hardin, Commissioner of Revenues of the State of Arkansas, and moves that he be substituted as the party plaintiff (appellant) in the above causes.

It is further moved that the above causes be consolidated for the purpose of argument, submission and decision by this Court for the reason that issues in each of said causes are identical and that the facts in each are the same with one minor exception which will clearly appear in the record and which will be pointed out in the briefs and argument.

Leffel Gentry, Attorney for appellant.

[fol. 43] IN SUPREME COURT OF ARKANSAS

Appeal from Pulaski Chancery Court

No. 6973

JOE HARDIN, Commissioner of Revenues, Appellant,

v.

J. E. DILWORTH, et al., Appellees

and

No. 6974

JOE HARDIN, Commissioner of Revenues,

v.

REICHMAN-CROSBY COMPANY

and

No. 6975

JOE HARDIN, Commissioner of Revenues,

v.

BINSWANGER & COMPANY

ORDER GRANTING MOTION TO SUBSTITUTE AND CONSOLIDATE—
January 25, 1943

On motion of the appellant, Murray B. McLeod, as Commissioner of Revenue, is substituted as appellant in place of Joe Hardin; and said causes are by the court consolidated for the purpose of briefing and submission.

[fol. 44] IN SUPREME COURT OF ARKANSAS

Appeal from Pulaski Chancery Court

No. 6973

MURRAY B. McLEOD, Commissioner of Revenues, Appellant,

v.

J. E. DILWORTH COMPANY, Appellee

and (Consolidated Cases)

No. 6974

MURRAY B. McLEOD, Commissioner of Revenues, Appellant,

v.

REICHMAN-CROSBY COMPANY, Appellee

Appeal from Pulaski Chancery Court

DECREE—April 26, 1943

These causes came on to be heard upon the transcript of the record of the chancery court of Pulaski County and were argued by solicitors, on consideration whereof it is the opinion of the court that there is no error in the proceedings and decree of said chancery court in this cause.

It is therefore ordered and decreed by the court that the decree of said chancery court in this cause be and the same is hereby in all things affirmed with costs.

It is further ordered and decreed that said appellees recover of said appellant all their costs in this court in this cause expended.

[fol. 45] IN THE SUPREME COURT OF ARKANSAS

McLEOD, Commissioner of Revenues,

v.

J. E. DILWORTH COMPANY and REICHMAN-CROSBY COMPANY,

OPINION—April 26, 1943

McFADDIN, J.:

These cases involve the retail sales tax law (Act 154 of 1937) and the gross receipts tax law (Act 386 of 1941).

Appellee, J. E. Dilworth Company, is a corporation organized under the laws of Tennessee, with its home office and place of business in Memphis, Tennessee. It is not

qualified to do business in Arkansas, and has no sales office, branch plant, or other place of business in this State. Orders for its machinery and mill supplies are procured in Arkansas by two traveling representatives (both domiciled in Memphis). The orders are subject to the approval of the home office. When the order is approved in Memphis, the merchandise is shipped f. o. b. Memphis, title to the merchandise being relinquished upon delivery to the common carrier. The traveling representatives do not collect any money. Appellee also receives orders by mail and telephone from Arkansas customers, which orders are accepted in Tennessee, and merchandise delivered to a common carrier in Tennessee with no title retained. The appellee is engaged in the general interstate business. Arkansas customers sometimes go to the office of the company in Memphis and buy goods direct, loading the same on the purchaser's truck and bringing the merchandise back to Arkansas.

The appellee, Reichman-Crosby Company, is likewise a corporation organized under the laws of Tennessee, with its principal place of business in Tennessee; and its business, in all instances, is conducted and handled exactly as the business of the J. E. Dilworth Company, as above recited.

The Commissioner of Revenues of the State of Arkansas [fol. 46] filed separate suits against the two appellees in the Pulaski Chancery Court alleging in each suit that the respective appellee, by reason of the transactions involved—that is, the traveling salesmen soliciting orders and the appellee shipping the goods to purchasers f. o. b. Memphis—was liable to the State of Arkansas for the retail sales tax or the gross receipts tax of two per cent, as hereinbefore mentioned. The Commissioner of Revenues, in filing suit in the Pulaski Chancery Court demanded that the defendants (appellees) severally furnish information as to the amount of the sales mentioned herein so that the Commissioner might levy the tax.

The appellees severally entered appearance, answered the complaint and furnished the requested information; but all the time contended that the tax could not be assessed, because the sales were consummated in Tennessee and delivery of merchandise was made in Tennessee, and the transactions were not taxable by the State of Arkansas

under the acts here involved. The appellees contended that the legislative acts of the State of Arkansas and the regulations pertaining thereto, in so far as they involved appellees' transactions, were void, as being contrarary to and infringing upon the Commerce Clause of the Constitution of the United States (Article I, paragraph 8) and the Due Process Clause of the Constitution of the United States (Amendment 14).

The chancery court made a finding that the Commissioner of Revenues could not require the appellee companies to collect and remit the Arkansas sales tax or gross receipts tax, and that the Commissioner of Revenues could not recover taxes from the appellees in either of these cases. Accordingly, the chancery court dismissed the complaints and these appeals followed.

The legal questions in these appeals are:

(1) Whether these cases are ruled by Mann v. McCarroll, [fol. 47] 198 Ark. 628, 139 S. W. 2d 721.

(2) Whether the decision of the United States Supreme Court in the case of McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 84 L. Ed. 565, justifies this Court in sustaining the tax here sought to be imposed notwithstanding the decision in Mann v. McCarroll, supra.

1. In the briefs and in the oral argument, there was considerable discussion of the extent and limits of the holding of this court in Mann v. McCarroll, supra, so a review of that case is essential at the outset.

In Mann v. McCarroll, the plaintiffs sought to enjoin the Revenue Commissioner from collecting sales tax under act 154 of 1937. The chancery court sustained a demurrer and dismissed the complaints. On appeal, the appellants (plaintiffs and interveners below) presented the case to this court by using the dilemma form of argument; that is, on one horn of the dilemma the appellants argued that if the tax be a "use" tax, then the tax would be unconstitutional, arguing that the State could not impose a "use" tax; and on the other horn of the dilemma, the appellants argued that if the tax be a "sales" tax; then it would be a burden on interstate commerce and unconstitutional and void under the facts and circumstances in that particular case.

In the opinion, this court explored the first horn of the delemma, and held that the tax was not a use tax, saying: "We are, therefore, of the opinion that this sub-division does not levy or impose a use tax and until such tax is levied and imposed, of course, the question does not arise as to its validity, whether it be a property tax or otherwise." That conclusion ended the use tax argument.

Whether a "use tax" is constitutional or unconstitutional was not there decided; and Mann v. McCarroll does not foreclose the question—which is still open before this [fol. 48] court—as to whether a use tax is constitutional; and any statement therein to the contrary is dicta. We point this out so that the dicta in one decision will not be seized on as the *ratio decidendi* in the next decision; and we point this out for the further reason that no constitutional question is ever to be considered as decided in any case unless that question is necessary for decision in this case.

The second horn of the dilemma presented to the court in Mann v. McCarroll was that if the tax was a sales tax it was a burden on interstate commerce under the facts there involved. This court said:

"Substantially the appellee argues that no sales tax could be levied on a sale made in another state which was thereafter to be brought into the State; that such a tax, that is a sales tax, on a sale made in another jurisdiction would be an unwarranted burden on interstate commerce in violation of the commerce clause of the United States Constitution, and, therefore, invalid."

The court then analyzed subdivision F of Section 4 of the act (being the section urged by the appellee therein as distinguishing the tax from a sales tax) and said:

"The purpose of the said sub-division (F) aforesaid, is valid beyond a question if it be treated purely as part of the machinery to aid in the collection of a sales tax, and not in fixing liability upon property not subject thereto."

The court thus held the tax was a sales tax and void under the Commerce Clause of the Constitution of the United State in so far as the transactions therein were concerned.

The facts in the cases at bar are substantially the same—so far as the interstate commerce characteristics—as in Mann v. McCarroll, therefore, we now hold that the transactions here involved occurring under act 154 of 1937, and

prior to the effective date of act 386 of 1941, are directly [fol. 49] ruled by Mann v. McCarroll; and therefore not subject to the tax.

The appellant urges that the tax levied by the gross receipts tax act of 1941 is more than a sales tax, but we cannot agree with that contention.

The tax provided by act 154 of 1937 is commonly referred to as the retail sales tax. Since the enactment of act 386 of 1941, the tax has been legally called "gross receipts tax." Both taxes are generally referred to as the "sales tax." Whatever name may be given to the tax levied in either of the acts, the type of the tax provided is essentially the same. The only changes that have been made in the tax since 1935 have been with regard to the scope of the tax and the mechanics of the administration of the law and the collection of the tax. We think it is absolutely clear that the gross receipts tax of 1941, as here involved, is a retail sales tax, and therefore the same type of tax as was involved in Mann v. McCarroll.

2. The appellant argues that in Mann v. McCarroll we placed a construction on the power of the state to tax, which construction is too narrow, and that, since Mann v. McCarroll, the United States Supreme Court has rendered its decision in the Berwind-White Coal case (McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. 33; 84 L. Ed. 565). In effect, the appellant argues that on the strength of the Berwind-White Coal case, we should now overrule our own case of Mann v. McCarroll in favor of a broader taxing desire.

It is our conclusion that the Berwind-White Coal case does not go as far as the appellant contends, and that it introduces no new feature into the law regarding interstate commerce, as previously declared. In the Berwind-White Coal case there was involved a retail sales tax of New York City. The Berwind-White Coal Mining Company, a Pennsylvania corporation, was engaged in the production of coal from its mines in Pennsylvania, and it sold the coal [fol. 50] to consumers and dealers. It maintained a sales office in New York City. All the sales contracts with the New York customers involved in that case (with two exceptions not germane) were entered into in New York City, and required delivery of the coal by the Berwind-White Coal Mining Company to the purchasers in New York City. In other words, there was a place of business in New York

City and a delivery in New York City; and therefore the tax of New York City was upheld. The United States Supreme Court, speaking by Chief Justice State, said:

"The like taxation of property, shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation. An excise for the warehousing of merchandise preparatory to its interstate shipment or upon its use, or withdrawal for use, by the consignee after the interstate journey has ended is not precluded."

The distinguishing point between the Berwind-White Coal case and the cases at bar is that in the Berwind-White Coal case the corporation maintained its sales office in New York City, took its contracts in New York City and made actual delivery in New York City whereas, in the cases at bar, the offices are maintained in Tennessee, the sale is made in Tennessee, and the delivery is consummated either in Tennessee or in interstate commerce with no interruption from Tennessee until delivery to the consignee essential to complete the interstate journey. The rule still obtains, that, in cases of this type, delivery to the carrier is delivery to consignee. We hold that the Berwind-White Coal case affords the appellant no ground for asking an overruling by this court of Mann v. McCarroll.

The fact that the appellees have traveling salesmen who come into this State to solicit orders is not sufficient to [fol. 51] take the transaction out of interstate commerce. The sale is not made when the traveling man takes the order, but when the order is accepted and the goods are loaded f. o. b. cars in Tennessee. Furthermore, the Crenshaw case (Crenshaw v. Arkansas, 227 U. S. 389, 57 L. Ed. 565, 33 Sup. Ct. Rep. 294) is adverse to the contention of the appellant herein. Our attention has been called to the cases of Nelson v. Sears, Roebuck & Co., 312 U. S. 359, 85 L. Ed. 888, and Nelson v. Montgomery Ward & Co., 312 U. S. 372, 85 L. Ed. 897, as instances where corporations were required to collect a tax for goods sold and used in the taxing State; but there are two distinctions between these cases and the cases at bar: first, the tax there involved was a *use tax* and not a *sales tax;* and second, each company had an office in the State in which the tax was levied. Likewise, we point out that it was a *use* tax, and not a *sales* tax that was sustained in Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62; 83 L. Ed. 488.

To conclude, we hold herein: (1) that the tax here involved is a sales tax; and (2) that as a sales tax, it would be a burden on interstate commerce for the tax to be imposed and collected under the facts in these cases.

It therefore follows that the decision of the chancery court was correct and it is hereby affirmed.

[fol. 52] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR REHEARING

The appellant respectfully petitions the court to grant a rehearing in the above causes for the following reasons:

1. The court was in error in concluding that the questions presented were "(1) Whether these cases are ruled by Mann v. McCarroll, 198 Ark. 628, 130 S. W. 2d 721; (2) Whether the decision of the United States Supreme Court in the case of McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 84 L. ed. 565, justifies this court in sustaining the tax here sought to be imposed notwithstanding the decision in Mann v. McCarroll, supra."

These were not the real issues in these cases. The real issues in these cases, as presented by the pleadings and the briefs of the respective parties, were: (1) Whether the acts under consideration intended to include transactions of the sort involved as being taxable; and (2) Assuming the transactions were intended to be taxed, whether such intent was beyond the power of the state, that is, whether the acts violated the state or federal constitution.

The court apparently concluded that the transactions were within the scope of the definition of the sales provided by the acts to be taxed, but further concluded that the tax could not be imposed and collected on the transactions involved because it would be a burden on interstate commerce and therefore prohibited by the federal constitution.

[fol. 53] Should the court adhere to its conclusion that the collection of the tax on these transactions is prohibited by the interstate commerce clause of the federal constitution,

it should nevertheless clarify its opinion to show clearly that its opinion affirming the decision of the lower court, holding that the Commissioner of Revenues cannot collect the taxes on the transactions involved, is based solely on the proposition that a sales tax laid upon a purchaser cannot be collected on transactions in interstate commerce.

2. The court was incorrect in holding that in the case of Mann v. McCarroll, 198 Ark. 628, it was held that the tax, provided by act 154 of 1937, could not be levied on transactions in interstate commerce.

In the case of Mann v. McCarroll, the court did not pass upon the question of whether the collection of the tax was a burden on interstate commerce. It is true, that in the action which was brought to restrain the Commissioner of Revenues the collection of taxes on the transactions there involved, it was alleged that the collection of the tax would be a burden on interstate commerce, but the Commissioner of Revenues conceded in that case that if no use tax was levied, then the tax could not be validly collected because it would be a burden on interstate commerce. The court in the present case quoted from Mann v. McCarroll in an effort to support its proposition, that in that case the court had held that the tax was a burden on interstate. The quotation is as follows: "Substantially the appellee argues that no sales tax could be levied on a sale made in another state which was thereafter to be brought into the state; that such a tax, that is a sales tax, on a sale made in another jurisdiction would be an unwarranted burden on interstate commerce in violation of the commerce clause of the United States Constitution, and, therefore, invalid." However, we call the [fol. 54] court's attention, as we did in our original brief, that this was an admission on the part of the Commissioner of Revenues for he was the "appellee" in that case. The language quoted, therefore, does not sustain the court's present conclusion, in its opinion in this case, that the collection of the tax on the transactions involved would burden interstate commerce.

3. The court was incorrect in saying:

"2. The appellant argues that in Mann v. McCarroll we placed a construction on the power of the state to tax, which construction is too narrow, and that, since Mann v. McCarroll, the United States Supreme Court has rendered its de-

cision in the Berwind-White Coal case (McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. ee, 84 L. Ed. 565). In effect, appellant argues that on the strength of the Berwind-White Coal case, we should now overrule our own case of Mann v. McCarroll in favor of a broader taxing desire."

In the appellant's original brief, it was stated that there could be no quarrel in the decision of the case of Mann v. McCarroll, except as to the obiter dictum relating to the constitutionality (under the state constitution) of a use tax. The appellant did say in its original brief, and now reiterates, that the Mann v. McCarroll case is not controlling in these cases under consideration because that case held only that act 154 of 1937 did not levy a use tax.

Further, the appellant does say that if it be conceded for argument sake that the Mann v. McCarroll case held that transactions of the sort involved could not be taxed because of the interstate commerce clause, (which was the conclusion of the previous Commissioners of Revenues), this conclusion has been denied by the Supreme Court of the United States in the case of Goldrick v. Berwind-White Coal Min. Co., 309 U. S. 33, 84 L. Ed. 565, and com-[fol. 55] panion cases.

4. The court was incorrect in holding that the facts in these cases distinguish them in principle from the Berwind-White Coal decision; and the court, in its opinion, entirely overlooked the decision of the Supreme Court of the United States in the case of McGoldrick v. A. H. Du Greiner, Inc., 309 U. S. 70, which case on its facts is almost on all fours with these cases (as was stated in appellant's original brief).

5. The court was incorrect in holding that the decision in the case of Crenshaw v. Arkansas, 227 U. S. 389, supported its conclusion that the collection of the tax on the transactions here involved was prohibited by the commerce clause of the federal constitution, since that case did not involve a tax laid upon the purchaser, such as the sales tax here involved, but rather involved an occupation or privilege tax for engaging in business.

6. The court was incorrect in stating that: "Appellant has cited us to the cases of Nelson v. Sears, Roebuck & Co.,

312 U. S. 359, 85 L. Ed. 888, and Nelson v. Montgomery Ward & Co., 312 U. S. 372, 85 L. Ed. 897, * * *."

The appellant did not cite these cases anywhere in his brief. The appellant did cite, and discuss on pages 80 and 81 of his brief, the case of Felt & Tarrant Manufacturing Company v. Gallagher, 306 U. S. 62, for the purpose of pointing out to the court that the Supreme Court of the United States had upheld the right of a state to require an out-of-state seller, having no place of business in the state, to collect a use tax and had said that this was not a burden on interstate commerce. And he pointed out that as to the question of requiring out-of-state seller to collect the tax, it made no difference whether the tax was a sales or use tax. This certainly could not be disputed.

[fol. 56] Wherefore, the appellant prays that the court grant a rehearing in these causes and that the decree of the lower court be reversed with direction to enter judgments for the Commissioner of Revenues.

Leffel Gentry, Attorney for appellant.

CERTIFICATE

I, Leffel Gentry, attorney for the appellant, hereby certify that I believe there is merit in this petition and it is not filed for the purpose of delay but in order that justice may be done.

Leffel Gentry.

[fol. 57] IN SUPREME COURT OF ARKANSAS

ORDER DENYING PETITION FOR REHEARING—May 31, 1943

Being fully advised, the petitions for rehearing in the following causes, are by the court severally overruled, viz:

No. 6973 Murray B. McLeod, Commr. v. J. E. Dilworth Company.

No. 6974 Murray B. McLeod, Commr. v. Reichman-Crosby Co.

[fol. 58] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 59] IN SUPREME COURT OF ARKANSAS

No. 6975

JOE HARDIN, COMMISSIONER OF REVENUES, Appellant,

v.

BINSWANGER & COMPANY, Appellee

Pulaski Chy. Clk. Frank H. Dodge, Ch.

PRAYER FOR AND ALLOWANCE OF APPEAL—Sept. 23, 1942

Comes the plaintiff herein and by his attorney, prays an appeal to the Supreme Court.

Leffel Gentry, Attorney.

Appeal granted Sept. 23, 1942.
C. R. Stevenson, Clerk
By Frank H. Cox, D. C.

[fol. 60] [Caption Omitted]

[fol. 61] IN THE PULASKI CHANCERY COURT

No. 64277

JOE HARDIN, COMMISSIONER OF REVENUES, Plaintiff,

v.

BINSWANGER & COMPANY, A CORPORATION, Defendant.

COMPLAINT—Filed Feb. 26, 1942

1

The plaintiff is the duly apointed, qualified and acting Commisioner of Revenues of the State of Arkansas.

2

Act 154 of the acts of the General Assembly of 1937, as amended by act 364 of the acts of the General Assembly of 1939, levied a tax of two per cent (2%) on the gross proceeds derived from all retail sales, as defined in said act. The said tax was levied upon the purchaser but, by the terms of said act, it was provided that the retailer was to collect the tax and remit the same to the Commisisoner of

Revenues. Prior to September 24, 1940, the Commissioner of Revenues had not interpreted the act to apply to sales in Interstate Commerce but, on said date, September 24, 1940, the Commissioner of Revenues promulgated a regulation requiring the collection and payment of the taxes on sales originating outside the State where the delivery of the tangible personal property was finally made to a purchaser at a point in the State of Arkansas. A copy of said Regulation is attached hereto as "Exhibit A".

Act 386 of 1941 became effective July 1, 1941, and repealed act 154 of 1937, as amended. It levied a tax of two per cent (2%) on the gross proceeds derived from all sales as defined in said act, except such sales as were specifically exempted. The tax was upon the purchaser but the seller was required to collect and remit the tax to the Commis- [fol. 62] sioner of Revenues. Simultaneous with the effective date of said act 386 of 1941, the Commissioner of Revenues, under authority of said act, promulgated Article numbered 27, in substance the same as Regulation numbered 16 theretofore in effect under act 154 of 1937, as amended. A copy of said Regulation, numbered 27, is attached hereto as "Exhibit B".

3

The defendant, Binswanger & Company, is a corporation organized under the laws of the State of Tennessee, with its principal place of business in the City of Memphis, Tennessee. It is not qualified to do business in Arkansas and has no place of business in this State but it engages in business activity as defined by Regulation numbered 16, promulgated under act 154 of 1937, as amended and as defined by Article 27 of the Regulations promulgated under act 386 of 1941. Its manner of doing business in Arkansas is as follows:

A. It is engaged in the mill supply business and, for the most part, its sales are to consumers, but a small part of its business consists of sales to retailers for resale. It has several traveling salesmen or solicitors who travel out of Memphis and in the State of Arkansas and solicit orders in this State. All orders are taken by said traveling salesmen, subject to the acceptance at the home office of the company, in Memphis, Tennessee, and the authority of such traveling salesmen is so limited. If the order is accepted by the company, the goods are delivered, in some instances,

to a common carrier f.o.b. Memphis, the customer pays the freight and the goods are consigned direct to the customer. In other instances, the goods are delivered to the purchaser in Arkansas by defendant's own conveyances.

B. The company receives orders by mail and telephone [fol. 63] from customers in Arkansas, and if these orders are accepted the goods are delivered, in some instances, to a common carrier f.o.b. Memphis, the customer pays the freight and the goods are consigned direct to the customer. In other instances, the goods are delivered to the purchaser in Arkansas by defendant's own conveyance.

C. The defendant company also makes sales of goods or merchandise to purchasers who come from Arkansas and obtain delivery of such goods or merchandise at its place of business in Memphis, which goods or merchandise are taken by the purchasers into the State of Arkansas for use or consumption.

4

The plaintiff, Commissioner of Revenues of the State of Arkansas, has demanded that the defendant report the gross proceeds derived from all of its sales in Arkansas since the date of September 24, 1940, not including that merchandise sold and delivered in Memphis to Arkansas purchasers (mentioned in paragraph 3-C) and has demanded that the defendant company remit to him a tax of two per cent (2%) of the gross proceeds derived from all such sales, except those sales for resale, or such other sales as may be specifically exempt by law, but the defendant company has failed and refused to make such reports or to pay the taxes demanded of it.

The amount of such sales as made by the defendant company during said period of time and the tax due the Commissioner of Revenues on such sales is unknown to him and, in order to ascertain the amount of taxes due by the defendant company, an accounting is necessary; and, therefore, the plaintiff has no adequate remedy at law.

Wherefore, the plaintiff, Joe Hardin, Commissioner of Revenues for the State of Arkansas, prays that the defendant, Binswanger & Company, be required to submit its records so that an accounting may be had of its sales to pur- [fol. 64] chasers in the State of Arkansas and that, upon such accounting, the amount of taxes due by the defendant

company to the Commissioner of Revenues be determined, and that the Commissioner of Revenues have judgment for and against said defendant company for such amount; and the plaintiff further prays for his costs and all other proper relief.

Leffel Gentry, Attorney for plaintiff.

[fols. 65-67] Exhibit A to Complaint Omitted. Printed Side Page 7 Ante.

[fol. 68] Exhibit B to Complaint Omitted. Printed Side Page 10 Ante.

[fols. 69-70] [File endorsement omitted.]

[fol. 71] In the Pulaski Chancery Court

[Title omitted]

Answer of Binswanger & Company, a Corporation—Filed April 1, 1942

Defendant, Binswanger & Company, a corporation, appears by its attorneys, Daggett & Daggett, of Marianna, Arkansas, and for answer to the complaint states:

The allegations of paragraphs one (1) and two (2) and three (3) of the complaint are admitted but are insufficient, separately or collectively, in law or in fact, to constitute a cause of action against defendant.

For answer to paragraph four (4) of the complaint, defendant states that the gross receipts from sales made by defendants to residents of Arkansas, in the manner set forth in the complaint during the period from September 24, 1940, to July 1, 1941, and from July 1, 1941, to November 1, 1941, are shown on the following tabulated statement:

From September 24, 1940, to July 1, 1941:

(1) Gross receipts from sales where the order is secured by traveling salesmen or solicitors of the company, where the order is accepted and goods shipped f. o. b. Memphis consigned to the purchaser	$53,620.00

(2) Gross receipts from sales made by orders from Arkansas residents where the orders are telephoned or sent by mail to Binswanger & Company and by it delivered to a common carrier, consigned to the purchaser	$2,105.33
(3) Gross receipts from sales made to Arkan- [fol. 72] sas residents who come to Memphis, purchase the goods and take them away in their own trucks	956.49
(4) Gross receipts from sales made in wholesale to retailers in the state of Arkansas said sales being made for the purpose of resale	68,511.00

From July 1, 1941, to November 1, 1941:

(1) Gross receipts from sales where the order is secured by traveling salesmen or solicitors of the company, where the order is accepted and goods shipped f. o. b. Memphis consigned to the purchaser	28,563.40
(2) Gross receipts from sales made by orders from Arkansas residents where the orders are telephoned or sent by mail to Binswanger & Company and by it delivered to common carrier, consigned to the purchaser	1,643.32
(3) Gross receipts from sales made to Arkansas residents who come to Memphis, purchase the goods and take them away in their own trucks	434.15
(4) Gross receipts from sales made in wholesale to retailers in the State of Arkansas, said sales being made for the purpose of resale	41,723.41

By way of affirmative defense and in bar of the right of plaintiff to enforce and recover the tax herein sought to be enforced and recovered, defendant further says:

[fol. 73] 1. Act 154-1937, as amended by act 364-1939, and act 386-1941 are not applicable to sales of goods such as are alleged to have been made by defendant in the conduct of

its business wholly in interstate commerce, and are void as being contrary to and infringing on the Commerce Clause of the Federal Constitution, and any endeavor on the part of plaintiff, in his official capacity, to enforce and collect the tax alleged to be due by defendant on sales of goods so alleged to have been made by defendant would constitute a burden on interstate commerce and constitute a violation of Section 8, Article I of the Constitution of the United States.

2. Regulation 16, promulgated by the Commissioner of Revenues under act 154 of the acts of the General Assembly of 1937, as amended by act 364 of the acts of the General Assembly of 1939, and Regulation number 27, promulgated by the Commissioner of Revenues under act 386 of the acts of the General Assembly of 1941, are naught more than an attempt on the part of the Commissioner to levy and enforce a tax on the use of the property sold by defendants to residents of Arkansas and, therefore, constitutes an additional tax on the property itself, in violation of the uniformity provisions contained in Article XVI, Section 5, of the Constitution of Arkansas, 1874.

3. Act 154 of the acts of the General Assembly of 1937, as amended by act 364 of the acts of the General Assembly of 1939, was construed by the Supreme Court of Arkansas in Mann v. McCarroll, Commissioner, 198 Ark. 628, in which the court held that the provisions of said act, as amended, could not be extended to sales of personal property consummated in other states and subsequently delivered to residents of Arkansas within the State of Arkansas. Defendant, therefore, pleads a vested right in such judicial construction of [fols. 74-75] said act and says that the attempt of plaintiff to collect the tax sought to be collected from defendant herein during the period between September 24, 1940, to July 1, 1941, is prohibited by the Fourteenth Amendment to the Constitution of the United States, and by Section 8 of Article II of the Constitution of the State of Arkansas.

4. Act 386 of the General Assembly of 1941 is virtually a reenactment of act 154 of the acts of 1937, as amended by Act 364 of the acts of 1939. Therefore, the judicial construction of the act of 1937 by this court, in Mann v. McCarroll, must be deemed to be the legislative intent of act

386 of the acts of 1941, and said act 386 must be so construed.

5. Defendant further states that, at all times during the period between September 24, 1940, to this date, it has not in anywise been engaged in an intrastate business in the State of Arkansas. To the very contrary, the only business it has conducted in the State of Arkansas has been interstate in character. All of the sales of goods, wares or merchandise made by defendants to residents of Arkansas have been made on contracts entered into and wholly performed in the State of Tennessee and without the State of Arkansas. And, therefore, the State of Arkansas is without power to tax any transaction, contract or alleged sale of goods, wares or merchandise made by defendant beyond territorial limits of the State of Arkansas.

Premises considered, defendant prays that it be discharged with its costs herein expended; and for all other proper and equitable relief.

Respectfully submitted, Daggett & Daggett, by W. H. Daggett.

[File endorsement omitted.]

[fol. 76] IN THE PULASKI CHANCERY COURT

No. 64277

JOE HARDIN, Commissioner of Revenues, Plaintiff,

v.

BINSWANGER & COMPANY, Defendant

DECREE—May 13, 1942

On this day plaintiff, Joe Hardin, Commissioner of Revenues for the State of Arkansas, appeared by his attorneys, Leffel Gentry and Elsijane Trimble, and defendant, Binswanger & Company, appeared by attorneys, Daggett & Daggett. Thereupon, this cause was submitted to the court on the complaint of Plaintiff and the answer of defendant thereto.

On the facts alleged in plaintiff's complaint, admitted in the answer of defendant, and upon the facts alleged by way of affirmative defense in defendant's answer, not denied by plaintiff, the court finds that plaintiff cannot enforce against, nor recover from, the defendant any taxes alleged to be due by defendant in the complaint filed by plaintiff.

Therefore, it is by the court considered, ordered and adjudged that the complaint of the plaintiff be, and is, hereby dismissed.

To the ruling and action of the court in dismissing the complaint of the plaintiff, exceptions were taken by plaintiff and an appeal prayed to the Supreme Court, which is granted. May 13, 1942. (Chancery Record 120, page 394).

[fol. 77] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 78] IN SUPREME COURT OF ARKANSAS

DECREE—April 26, 1943

This cause came on to be heard upon the transcript of the record of the chancery court of Pulaski County and was argued by solicitors; on consideration whereof it is the opinion of the court that there is error in the proceedings and decree of said chancery court in this cause, in this: The facts relating to deliveries made by appellee in this State in its own conveyances, were not sufficiently developed for a decision of the case.

It is therefore ordered and decreed by the court that the decree of said chancery court in this cause rendered be, and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs; and that this cause be remanded to said chancery court with directions to develop the facts, and for further proceedings to be therein had according to the principles of equity, and not inconsistent with the opinion herein delivered.

It is further ordered and decreed that said appellant recover of said appellee all his costs in this court in this cause expended, and have execution thereof.

[fol. 79] IN THE SUPREME COURT OF ARKANSAS

McLEOD, Commissioner of Revenues,

v.

BINSWANGER & COMPANY

OPINION—April 26, 1943

McFADDIN, J.:

The opinion delivered by this court today in cases No. 6973 (McLeod, Commissioner, v. J. E. Dilworth Company) and No. 6974 (McLeod, Commissioner, v. Reichman-Crosby Company) is ruling in this present case in every particular except one; and that one difference necessitates some additional consideration of this Binswanger case. The appellee, Binswanger & Company, is a corporation organized under the laws of Tennessee, with its home office and place of business in Nashville, Tennessee, and its business in all instances is conducted and handled exactly as the business of J. E. Dilworth Company (appellee in case No. 6973) and Reichman-Crosby (appellee in case No. 6974) except that in some instances the Binswanger Company delivered the goods purchased to the purchaser in Arkansas by its own conveyances.

The Commissioner of Revenues of Arkansas filed suit against the Binswanger Company just as he did against the J. E. Dilworth Company and Reichman-Crosby Company, but in the Binswanger case there was, in paragraph No. 3 of the complaint, an additional allegation to the effect that in some instances the goods purchased were delivered by the Binswanger Company to the purchaser in Arkansas by the Binswanger Company's own conveyances. The answer of the Binswanger Company admitted this allegation of delivery, but claimed the same was insufficient to differentiate it from the Dilworth case and the Reichman-Crosby case.

[fol. 80] Therefore, from the complaint and answer it appears that the Binswanger Company did solicit orders in Arkansas, and did make delivery to purchasers in Arkansas from the Binswanger Company's own conveyances. In this particular, and only to the extent of such deliveries, the rule in the Dilsworth Company case and the Reichman-Crosby Company case this day decided may not apply. The

Binswanger deliveries in Arkansas might be sufficient to differentiate the Binswanger case from Mann v. McCarroll, 198 Ark. 628, and might bring the Binswanger case into the rule announced by the United States Supreme Court in McGoldrick v. Felt & Tarrant Mfg. Co., 309 U. S. 70, 84 L. Ed. 584, 60 Sup. Ct. Rep. 404. No proof was taken as to how the deliveries were made. We are not able to determine whether the interstate journey had ended so that the sales tax could apply.

So we reverse and remand this case against Binswanger & Company to the chancery court in order that the facts may be developed concerning the delivery of goods in Arkansas, and for further proceedings by the chancery court not inconsistent with the opinion in the J. E. Dilsworth case, supra, and this case.

[fol. 81] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR REHEARING

The appellant respectfully petitions the court to grant a rehearing in the above cause for the following reasons:

1 to 6, Incl.

The reasons heretofore assigned in petitions for rehearing in causes Numbers 6973 and 6974, companion cases to this one, are herewith assigned as reasons for the granting of a rehearing in this cause.

7

The court was incorrect in remanding this case with directions that the facts be developed concerning delivery of goods in Arkansas by means of appellee's own conveyances; and in not remanding the case with directions for the lower court to enter a judgment against the appellee for the amount of taxes as may be determined to be due by reason of all deliveries made by the appellee by means of its own conveyances to purchasers in Arkansas.

There can be no further development of the facts concerning the method of delivery. The complaint alleged that

the merchandise was delivered by means of appellee's own conveyances and this was admitted by the answer. The extent and amount of the tax involved in these transactions necessarily would be determined upon remand of the cause with directions to enter judgment after ascertainment of these facts.

[fol. 82] Wherefore, the appellant prays that a rehearing be granted in this cause and that the decree of the lower court be reversed with directions to enter judgment against the appellee for the taxes on all transactions here involved; or, at least, that, as to the merchandise sold by appellee and delivered in its own conveyances, the lower court be directed to enter judgment that may be determined from the facts which may be offered in evidence as to the extent of these transactions and the amount of the tax due.

Leffel Gentry, Attorney for appellant.

I, Leffel Gentry, Attorney for the Appellant, hereby certify that I believe there is merit in this petition and it is not filed for the purpose of delay but in order that justice may be done.

Leffel Gentry.

[fol. 83] In Supreme Court of Arkansas

Order Denying Petition for Rehearing—May 31, 1943

Being fully advised, the petitions for rehearing in the following causes, are by the court severally overruled, viz:

* * * * * * *

No. 6975 Murray B. McLeod, Commr. v. Binswanger & Company

[fol. 84] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 85] Supreme Court of the United States

Order Allowing Certiorari—Filed October 25, 1943

The petition herein for a writ of certiorari to the Supreme Court of the State of Arkansas is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.